

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ROQUETTE FRÈRES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 06-540 (GMS)
	)	
SPI PHARMA, INC. and DRYTEC LTD.,	)	
	)	
Defendants.	)	

**PLAINTIFF ROQUETTE FRÈRES' MOTION FOR LEAVE TO FILE A  
SUR-REPLY BRIEF IN OPPOSITION TO SPI PHARMA, INC'S REPLY BRIEF**

Plaintiff Roquette Freres ("Roquette") moves for leave to file a Sur-Reply to Defendant SPI Pharma Inc.'s ("SPI") Reply Brief, attached hereto as Exhibit 1.

SPI in its reply improperly introduced new allegations, based upon newly submitted documents, in violation of D. Del. L.R. 7.1.3(c)(2). Moreover, SPI's new allegations attempt not merely to support its initially presented arguments, but to shift its arguments to significantly different theories.

Specifically, SPI improperly introduced in its reply brief the following new material:

1. New interpretation of data Tables in JP 61-85331 and JP 61-85330, based on new documents that were not submitted with its opening brief;
2. New allegations regarding Table 1 of the patent-in-suit, which allegations were entirely absent from its opening brief; and
3. A new allegation that Table 2 of the patent-in-suit omitted compressibility data that Roquette possessed.

Regarding item 1, SPI alleged in its opening brief that each of JP 61-85331 and JP 61-85330 contains data that "show" that samples had certain stated percentage values of particles with a size of less than 200 mesh (75 microns). SPI made that allegation without submitting the Japanese language documents or English language translations. Now, in its reply brief, SPI submits for the first time English translations of the two Japanese documents and alleges instead that it "calculates" those percentage values based upon a theory of interpretation that was nowhere mentioned in its opening brief.

Regarding item 2, SPI alleges for the first time in its reply that Table 1 of the patent-in-suit, under the column headed "Mannitols described in JP 61-65330", presents data for friability and apparent density that are incompatible with the data presented for dissolution time. These allegations also were nowhere mentioned in SPI's opening brief.

Regarding item 3, SPI alleges for the first time in its reply that Roquette withheld "compressibility data," rather than "compression force data" as SPI initially alleged in its opening brief, and further newly alleges that such compressibility data might have been relevant to the tablet hardness results depicted in Table 2 of the patent-in-suit.

SPI's above-described improper supplementation and substitution of new evidence and new allegations in its Reply Brief are prejudicial to Roquette. Roquette should be provided the opportunity to respond so as to mitigate that prejudice.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ *Julia Heaney*

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February 6, 2008

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**RULE 7.1.1 CERTIFICATE**

Pursuant to D. Del. L.R. 7.1.1, this is to certify that counsel for Roquette contacted counsel for SPI about the subject matter of this motion and counsel for SPI did not respond.

*/s/ Julia Heaney*

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Julia Heaney

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on February 6, 2008 I electronically filed the foregoing with the Clerk of the Court using CM/ECF which will send notification of such filing to the following:

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Additionally, I hereby certify that true and correct copies of the foregoing were caused to be served on February 6, 2008 upon the following individuals in the manner indicated:

**BY E-MAIL**

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